state and national courts is bringing the profession and the courts to more perfect comprehension of the subject. How deep the error had penetrated is apparent from the dissent of Chief Justice CHASE in *Tarble's case, supra.* And the fact that the proclamation issued by the national authority suspending the writ was broad enough to reach the state courts, would be of no importance beyond the proper limits of the national authority. It could not affect courts over whose ordinary jurisdiction it had no control. I. F. R.

Board for the Determination of Contested Elections. Kentucky.

JOHN B. COCHRAN *v.* T. C. JONES.[1]

Under the Constitution of Kentucky the giving, accepting or carrying of a challenge to fight a duel, disqualifies the person so acting for any office of honor or profit under the state, besides subjecting him to such punishment as may be prescribed by law.

The disqualification and the offence against the laws are separate subjects, and the Board for the Determination of Contested Elections has jurisdiction to decide the former, without reference to a conviction for the latter in a judicial tribunal.

A challenge may be accepted orally, although it be in writing.

Where the person receiving the highest number of votes for an office is ineligible, the person receiving the next highest number is not thereby elected, but there is a failure to fill the office, and a new election must be had.

THIS was a proceeding before the Board for the Determination of Contested Elections, to contest the right of the respondent to the office of Clerk of the Court of Appeals.

At the August election of 1874, the contestant and respondent were respectively candidates for the office of Clerk of the Court of Appeals. The contestant received 53,504 votes, and the respondent received 114,348 votes, making the majority in favor of the latter of 60,844 votes, and he therefore received a certificate of election.

On September 5th 1874, the contestant served the respondent with notice, in writing, that he would contest his right to the office upon two grounds, and that he would himself claim the office.

First. That, previous to the August election, 1874, to wit, on or about the 6th of June 1869, the respondent accepted a challenge from J. Hale, a citizen of this state, to fight him in single combat a duel with deadly weapons.

Secondly. That he, the contestant, was himself entitled to the

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[1] We give place to this decision upon an interesting and happily unusual subject, though it is not the judgment of a court. It is, however, the decision of a tribunal having final jurisdiction of the subject, and which is composed in the present case of distinguished lawyers.—ED. AM. LAW REG.

office, because he had received a greater number of votes than any other person voted for, who was constitutionally and legally eligible to hold said office.

The parties proceeded to take proof by depositions, touching the grounds specified in the notice, and having complied with the requirements of the statute in all the initial proceedings, brought the case properly before this Board.

THE BOARD, consisting of the Governor, Hon. P. H. LESLIE, Attorney-General Hon. JOHN RODMAN, Secretary of State Hon. G. W. CRADDOCK, State Treasurer Hon. J. W. TATE, and Auditor-General Hon. D. HOWARD SMITH, having considered the case, the majority, consisting of the Governor, Attorney-General and Secretary of State, filed the following opinion:—

The first question claiming our consideration is one of jurisdiction. Has this Board the authority to adjudicate upon the questions raised by the notice of contest, especially the ineligibility of Jones resulting from the alleged acceptance of a challenge to fight Dr. Hale in single combat with deadly weapons?

It was contended by the counsel for the respondent that we had no authority to inquire into the fact whether he had accepted a challenge, because, if true, it was a penal offence, and, without a judgment of conviction of a court of competent jurisdiction, it could not be inquired into by this Board. It therefore becomes necessary for us to examine the law by which this Board is organized, and also what powers and duties have been conferred or imposed upon it.[1] * * * * *

Section 20, article 8, of the Constitution, declares that "any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept, or knowingly carry a challenge to any person or persons, to fight in single combat with a citizen of this state, with any deadly weapon, either in or out of the state, shall be deprived of the right to hold any office of honor or profit in this Commonwealth, and shall be punished otherwise in such manner as the General Assembly may prescribe by law."

The statute passed in pursuance of the provision of the Constitution denounces against the party challenging a penalty of from three to twelve months' imprisonment, or a fine of five hundred

[1] The review by the Board of the Acts of the Legislature by which it was vested with jurisdiction in contested elections, being entirely local, is omitted.—ED. A. L. R.

dollars, or both. Against the party accepting, from one to six months' imprisonment, or a fine of two hundred and fifty dollars, or both. Against the party carrying or delivering the challenge, and the seconds, from ten to thirty days' imprisonment, or a fine of one hundred and fifty dollars, or both. And, in addition, it is enacted by the 4th section that "any person convicted of either of the offences named in the three previous sections shall forfeit any office he may then hold, and be excluded from and held disqualified from receiving and holding any office, and also from exercising the right of suffrage within this Commonwealth for seven years after the date of his conviction.

Besides, another statute gives a right of action for damages to the widow and minor children of a person killed in a duel, or to either of them, against the surviving principal, the seconds, and all others aiding or promoting the duel, or any of them, in which vindictive damages may be given, "for the suppression of the practice of duelling."

This comprehends, we believe, all the legislation upon the subject of duelling. The Constitution, it will be observed, imposes no penalty other than by declaring that the party shall be deprived of the right to hold any office of honor or profit in this Commonwealth. This provision of the Constitution was intended to execute itself, and in aid of such intention, the form of the oath was specifically prescribed by that instrument, which every officer should take before entering upon his office, commonly called the "duelling oath:" *Morgan, &c.*, v. *Vance*, 4 Bush 323; *McBride* v. *Commonwealth*, 4 Bush 321.

It is not provided in the Constitution, as in the statute, that upon *conviction* the party shall be deprived of the right to hold office; but that any one so offending shall, *ipso facto*, be deprived of the right to hold any office of honor or profit. Such would be the consequence though no statute upon the subject had been passed.

Can it be maintained that if the legislature had failed altogether to adopt any law in regard to duelling, that the constitutional provision upon the subject would be inoperative? What have we to do with the statute, or the punishment, or the disabilities prescribed by it? Nothing whatever. The grounds of disability set out in the notice of contest do not grow out of the statute, nor have they any connection with it; nor are they in any

manner dependent upon any provision of the statute. The only effect which we can in any possible state of case give to them, if found to be true, is what the Constitution prescribes, and not what the statute denounces. Does the Constitution declare the *giving, accepting, or knowingly carrying a challenge* a penal offence? If so, what is the penalty? If it be the disability to hold office, then the same penalty is imposed for being a member of Congress, a minister of the gospel, or for holding office under the Federal government or a foreign power.

No one will contend, we presume, that it is a penal offence to be a member of Congress, or a minister of the gospel of Christ; and yet, if one happens to be either when elected by the people to a state office, he cannot hold or exercise the duties of the office, because he is declared by the Constitution to be ineligible.

There are many disqualifications imposed by the Constitution, some applying to particular offices, and others general in their application. In respect to some a *conviction* is required, and in regard to others no previous conviction is made necessary. By section 3, of article 8, it is declared that "every person shall be disqualified from holding any office of trust or profit, for the term he shall have been elected, who shall be *convicted* of having given or offered any bribe or treat to secure his election."

Section 4 declares, that "laws shall be made to exclude from office and from suffrage those who shall thereafter be *convicted* of bribery, perjury, forgery, or other crimes or high misdemeanors."

It is declared in section 27, article 2d, "that no person while he continues to exercise the functions of a clergyman, priest, or teacher of any religious persuasion, society, or sect, nor while he holds or exercises any office of profit under this Commonwealth, or under the government of the United States, shall be eligible to the General Assembly, except attorneys," &c.; and in section 6, article 3d, it is declared, that "no member of Congress, or person holding any office under the United States, or minister of any religious society, shall be eligible to the office of governor."

Thus it will be seen that the Constitution, in express terms, requires a previous conviction in respect to some disqualifications, and as to others no conviction is required. We suppose the framers of the Constitution made these distinctions understandingly and for a purpose. They are not distinctions resulting from mere inadvert-

ence or accident, but of deliberate design, and in this light we are inclined to accept them. In the case of *Morgan, &c.* v. *Vance, supra*, the Court of Appeals held, that "so far as the Constitution requires of all officers to take the prescribed oath, and so far as it prescribes disqualifications upon acts and not upon judgment of conviction, the Constitution, as the supreme law of the land, executes itself without any extraneous aid by way of legislation, nor can its requirements be so defeated."

This is not a proceeding to forfeit or to enforce the forfeiture of the office nor to adjudge any penalty against the respondent for an offence, either under the Constitution or the statute. We have no jurisdiction for any such purpose. We have no authority to try Mr. Jones for a violation of the statute against duelling. We have no power to render any judgment against him of fine or imprisonment. This Board was not organized for any such purpose. Its powers and duties are confined to the inquiry whether there existed, at the time he was voted for, the absence of any of the qualifications required by the Constitution, or the presence of any of the disabilities imposed by it. Within this field for scope our powers, as we believe, are ample. Whether Mr. Jones accepted a challenge to fight Dr. Hale in single combat with deadly weapons, before he was voted for as a candidate for the office of clerk of the Court of Appeals, is a question of fact, and just as any other question of fact touching his want of the qualifications required by the Constitution, or his amenability to any of the disqualifications imposed by it, this Board, we think, undoubtedly has the right to try and adjudge.

It was not denied in argument that it is within the powers of this Board to inquire into the fact whether Mr. Jones had been examined as required by law, and held a certificate showing his qualifications to discharge the duties of the office for which he was a candidate. If we may do this, why may we not inquire into the fact whether he had accepted a challenge? Either fact found against Mr. Jones would render him ineligible to the office, and that is the only effect which this Board could give to either. Because the acceptance of a challenge, in addition to rendering him ineligible to the office claimed by him, also makes him liable, under the statute, to a prosecution for a misdemeanor, are we to be debarred from inquiring into the question whether a challenge had been accepted? If found to be true, what other use can we make

of it, or what other effect can we give to it, than to adjudge that he cannot hold the office of clerk?

The record of the judgment of this Board would not conclude Mr. Jones upon the trial of an indictment against him under the statute, nor could it be used as evidence upon any such trial. The judgment of this Board not having the effect of a conviction under the statute against duelling, nor operating as an estoppel in any subsequent trial upon an indictment for the offence, nor competent as evidence upon the trial of any such indictment, the consequences which counsel imagined would flow from it, outside of its effects upon the rights of the parties and issues in this case, are, as it would seem, wholly unfounded.

Section 8 of the Bill of Rights declares, "that the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolable, subject to such modifications as may be authorized by this Constitution."

It was also contended in argument, that inasmuch as the acceptance of a challenge to fight a duel was denounced by the statute as a penal offence, and, upon conviction, operated as a disfranchisement of the right of suffrage, as well as to hold office, that the Legislature was inhibited by the Constitution from creating any tribunal to try a person for such an offence without the intervention of a jury.

We have, in a former part of this opinion, endeavored to sho- that Mr. Jones is not on trial before us for any offence denounced by the statute, and we do not now propose to repeat, or to enlarge upon the reasons leading to that conclusion.

It is clear that the law creating this Board and defining its duties, gives to it plenary jurisdiction to try the contest for the office between the parties before us, and that, too, without the intervention of a jury. * * * * * *

It remains, therefore, for us to inquire whether the proofs in the case are sufficient to sustain the charge, to the effect that Jones accepted a challenge to fight Dr. Hale in single combat with deadly weapons.

It cannot be expected that we should, in this opinion, do more than state the substance of the evidence bearing upon and elucidating this question. Much of the evidence is incompetent and irrelevant, and, in some instances, conflicting.

It appears that Dr. Hale and Mr. Jones, on the 5th day of June

1869, had a quarrel in the town of Owensboro, of which they were both citizens, in which violent words were used. On the 6th day of June 1869, Dr. Hale wrote and sent, by his friend William H. Woodford, to Mr. Jones, the following note:

"OWENSBORO, June 6th 1869, 9 A. M.

"MR. T. C. JONES:

"SIR: Your conduct towards me yesterday evening was of so insulting a character as to induce me to demand of you that satisfaction which one gentleman should give another. My friend, Mr. W. H. Woodford, is authorized to receive any communication you may wish to send me, and to act as my friend in arranging the preliminaries for a hostile meeting between us. J. HALE."

This note, written by Dr. Hale, was handed to Mr. Woodford to be delivered to Mr. Jones.

Mr. Woodford proceeded to Mr. Jones's room, and there found him and W. N. Sweeney, Esq., in company, and he delivered the note of Dr. Hale to Jones, who received and read it. Woodford asked Jones whether he accepted, and he replied that he did, and turned to Sweeney and asked him to act as his friend. Sweeney said he could not do so, as it would debar him from the practice of law. Woodford then said to Jones that he could not accept a verbal answer to Dr. Hale's note, and Jones replied that as soon as he could procure a friend he would communicate with Woodford.

In about an hour afterwards Mr. Pointer appeared at the room of Dr. Hale—Woodford and McHenry being present—bearing the following note, which he delivered to Woodford:

"JUNE 6th 1869.

"MR. W. WOODFORD: Mr. Phil A. Pointer is my friend. Any arrangement you make with him will be entirely satisfactory to me.

"Yours, &c., T. C. JONES."

This note was in the handwriting of Jones. It was handed by Woodford to Dr. Hale, who made some remarks about its ambiguity, and McHenry read it and said it was all right.

Pointer and Woodford then retired to another room in the same building, and after discussing some propositions for a settlement of the difficulty, in which they could not agree, they drew up and signed the following paper:—

"OWENSBORO, KY., June 6th 1869.

"I, W. H. Woodford, acting as the friend of Dr. J. Hale, and I, Phil. A. Pointer, acting as friend to Thomas C. Jones, do hereby agree to have our respective principals at the foot of City Wharf at 4 o'clock, A. M., Monday morning, the 7th of June, and proceed thence across the Ohio river to the Indiana shore, and from there up behind the island lying nearly opposite to the city of Owensboro. We agree to select the ground after our arrival. The distance shall be fifteen paces, that our principals shall stand apart, and that they shall each be armed with a navy revolver; and that they shall fire at the word one, two, *three*, to be repeated until one or both be satisfied.

W. H. WOODFORD,
PHIL. A. POINTER."

This paper was signed in duplicate; one taken by Woodford and one by Pointer. These gentlemen then separated. In the meantime information of the pending duel had become notorious in the town of Owensboro, and some of the most prominent citizens of the town made an ineffectual effort to settle the difficulty. Pointer returned to Jones, and in order to prevent him from being arrested, took him to his father's house, a short distance above Owensboro, on the river.

Woodford also made arrangements to take Dr. Hale out of town; but Hale was arrested at the livery stable while waiting for his horse to be harnessed, and was put under bond. In the course of the same evening, after night, the officer went to the house of Thos. Pointer and called for Jones, who, with Phil. A. Pointer and Thomas Pointer, came out to the gate, when the officer said to Jones that he had come to arrest him; and Jones asked him what for; and he replied, that from information, he and Dr. Hale were engaged to meet in deadly conflict next morning. Jones then asked the officer what he wanted him to do. The officer said, "I want you to give a bond to keep the peace and not meet in that engagement." Jones asked what would be the amount of the bond. The officer said $10,000. Jones said the bond was a large one; to which the officer replied, that Hale had given one of that amount, and he exacted the same from him. Jones asked until next morning to execute the bond, which was granted; and he did on next morning execute bond. Pistols had been procured, cleaned and loaded, and skiffs to carry the parties across the river.

Jones was at the time a candidate for the office of Clerk of the

Daviess County Court, which candidacy he would of course have been under obligations to decline in the event he accepted the challenge, as it would have rendered him ineligible to the office. This was fully explained to him by Mr. Sweeney, and it would seem that, after Woodford left, Jones made up his mind not to fight a duel with Dr. Hale under any circumstances, and expressly instructed his friend Pointer, at the time of intrusting him with his note in reply to Dr. Hale's challenge, not to commit him to a duel. But this determination was not communicated to Woodford or Dr. Hale; but, on the contrary, was carefully and studiously concealed from them.

Pointer states in his deposition that he did not read the note of Jones in reply to Dr. Hale's challenge, although there was nothing to have prevented him from doing so; nor did he at any time communicate to his principal that he had violated instructions, and had actually arranged for a hostile meeting on the morning of the next day; nor does it appear from Pointer's deposition that Jones asked him for any information in regard to what had transpired between Pointer and Woodford, or that Pointer communicated any to Jones.

Pointer states further, that he did not make any arrangements to secure a pistol, or a surgeon for his principal, or a skiff or other craft to cross the river next morning. They, Pointer and Jones, were together nearly all day the 6th of June 1869; drove to Thos. Pointer's in a buggy together to avoid arrest, and remained together at the house of Thomas Pointer until after night, when Jones was arrested.

Pointer further states, that he did not believe any hostile meeting would take place; that it was a game of *bluff* upon the part of Dr. Hale and his friends, and that he intended to meet *bluff* with *bluff*.

We do not deem it necessary to dwell longer upon the details of the evidence, inasmuch as we have stated what we conceive to be the substance of so much of it as bears upon the question of fact which we are called upon to decide, viz.: Did Jones accept a challenge to fight Dr. Hale in single combat with deadly weapons?

The note addressed by Dr. Hale to Jones is certainly sufficiently explicit to indicate his purpose and the redress which he demanded. He not only demanded the satisfaction which was "due from one gentleman to another" for what was assumed to be a gross insult,

but he was still more specific, by clearly designating the character of the redress sought—a "hostile meeting between us." There could be no mistaking or misunderstanding of the meaning of this note. It was presented to Mr. Jones by an accredited friend of the writer, in the usual mode of conducting such warfare; and Jones, after reading it, being asked whether he accepted, replied that he did.

It was not necessary to complete the offence that a duel should be actually fought. Nor was it necessary that the acceptance should be in writing. An acceptance in writing may be usual, and probably is. In a matter so important to the parties concerned, we suppose it would be prudent to require a writing as the best evidence of the acceptance; but a writing is not required by the Constitution, and we do not deem a writing to be necessary to make the offence complete.

But a writing was given afterwards, and, so far from withdrawing or modifying the previous acceptance by parol, it but confirms and ratifies it; and still further, the friend and bearer of the writing, and who was fully accredited by it, met the friend of Dr. Hale and agreed with him upon the time and place at which the hostile meeting was to transpire, and the weapons with which the fight was to be made. Nothing remained to be done but for the parties to take their places and shoot at each other, as had been agreed upon, until one or both were satisfied. And though it be conceded that the arrangement made between Pointer and Woodford for a hostile meeting of their respective principals was without authority on the part of Pointer, and that Jones was not bound or concluded by it, still, if he had previously accepted Dr. Hale's challenge to fight, the disability denounced by the Constitution attached, whether he intended to fight or not. A party may accept a challenge under a reasonable expectation that it will never culminate in a fight. The offence is complete upon the acceptance of a *challenge to fight* a citizen of this state, in single combat, with deadly weapons. Whether the acceptance be made in good or bad faith, or whether it be couched in ambiguous terms, or whether it be direct or indirect, if designed to be understood by his adversary as an acceptance, and is so understood and regarded by him, it is an acceptance within the meaning of the Constitution. No secret mental reservation, or ulterior purpose inconsistent with what the acceptance implies or is understood to imply, can be relied upon.

It may be, and doubtless is, true, that when Jones informed Woodford that he accepted the challenge, he was excited, and spoke under the impulse of the moment; yet he did not, upon more mature deliberation, withdraw his acceptance or authorize Pointer to do so, nor was it withdrawn. Pointer did not intimate to Woodford or to Dr. Hale that Jones had changed his mind; but on the contrary, told them if they wanted a fight they should have it.

It is insisted, however, that as Woodford refused to receive a verbal response to Dr. Hale's note, Jones's verbal acceptance ought not to be regarded as an acceptance within the meaning of the Constitution. If it was not an acceptance, what was it? It was not objected to upon the part of Woodford because it was not in terms an acceptance, but because he wanted the evidence of the acceptance in writing.

If it be true that Jones did not intend to accept the challenge, nor to fight a duel at the time he asked Mr. Sweeney to act as his friend, why did Sweeney refuse to do so? Sweeney must have understood that an acceptance was intended, else he would not have made the reply, to the effect that he could not act because it would debar him from the practice of law; for he, as a lawyer, certainly knew that if Jones only wanted a friend to adjust the matter amicably with Dr. Hale, and in no event to commit him to a duel, there would be no danger nor impropriety, so far as we can see, in his undertaking such a mission. In fact, he did, in a short time afterward, draw up a scheme of adjustment, to which he and other prominent citizens signed their names, and urged its acceptance upon the parties.

If it be true that Jones did not intend to accept the challenge, and in no event to fight a duel, why did he and Pointer leave town to prevent an arrest? Why need he fear an arrest, when he had resolved neither to accept nor to fight? It seems to us somewhat inexplicable why Jones, upon Pointer's return from his interview with Woodford, did not inquire of him what had been done, or why Pointer did not deem it a matter of sufficient importance to communicate to Jones the result of his mission. It occurs to us that the nature of the business was of a character calculated to inspire intense anxiety and solicitude on the part of Jones, and yet, so far as we can see from the testimony of Pointer, there was apparently an utter indifference on the part of both of them—so much

so that Jones did not ask, and Pointer did not explain, what had been done, although they were together during the greater part of the evening of that day.

And further, when the officer, after night, went to Thomas Pointer's house, and called Jones out to the gate and informed him that he had come to arrest him, because he had been informed that he (Jones) was to meet Dr. Hale next morning in deadly conflict, Jones did not appear to be the least surprised at this announcement, nor did he deny it; but consented, after being told that Dr. Hale had been arrested and put under bond, to execute bond himself next morning.

If Jones did not, previous to this, understand that Pointer had made arrangements for him to fight the next morning, it would seem that nothing would be more natural than for him to disclaim any such purpose, and at once call upon his friend Pointer, who was standing near, either to corroborate the truth of his disclaimer, or to explain what he had done.

It is contended that Jones, upon being admitted to the office by the Court of Appeals on the 8th day of September last, took the duelling oath, and that is competent evidence in this case. We are surprised that such a proposition should be contended for. It cannot be maintained by any authority, or upon any rule or principle of evidence known to us. Jones was a competent witness, as we think, and his evidence might have been taken in this case. But it was not done. It is not for us to inquire why it was not done, nor perhaps to draw any inference from the omission to do so. We deem it not out of place, however, to say that his testimony might have affected the results of the case very materially.

The provisions of the Constitution upon the subject of duelling were adopted by the Convention upon mature deliberation. The subject was thoroughly debated by many of the most intellectual members of the Convention, and the provisions, as we find them in the Constitution, received the deliberate sanction of that body. To maintain the Constitution as the supreme law of the land is the duty of every citizen, and more especially is it the duty of those those who hold office under it. We cannot afford, nor are we inclined, to ignore our obligations and duties in this respect.

It was the intention of the framers of the Constitution to extir pate, if possible, the practice of duelling in this state. It was a notorious fact that statutory law had proven wholly inadequate to

prevent the evil, and that a law more permanent and effective than legislative enactment was necessary. And in order to prevent the preliminary steps towards the fighting of duels, it is declared that any person who shall, *directly or indirectly, give, accept or knowingly carry a challenge*, shall be deprived of the right to hold office, thus denouncing the initial steps in the process of bringing on a fight.

We are of the opinion, from the evidence, that the respondent, T. C. Jones, did, on the 6th day of June 1869, accept a challenge from J. Hale, a citizen of Kentucky, to fight him in single combat with deadly weapons.

It only remains for us to consider the question whether the contestant, J. B. Cochran, is entitled to the office, or whether it is vacant.

Subsection 8, article 7, title "Elections," General Statutes, page 388, enacts, that "Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the Board. When the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered. Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office."

It is contended by the counsel of Cochran, that inasmuch as Jones was ineligible to the office, all who voted for him threw away their votes, and that he, being the only other person voted for, or having received the greatest number of votes of any other candidate who was eligible, is entitled to the office.

We have examined the question carefully, and but for the length which this opinion has already reached, would review the arguments and authorities relied upon by the counsel of the contestant. Whatever may be the doctrine or practice in England, or in some of the states of the Union, we are satisfied that our statute is conclusive of the question in this state.

There is no ambiguity in the section quoted. The intention of the Legislature is, we think, perfectly manifest. It will be observed that three states of cases are provided for.

First. As between the candidates receiving the highest, but an

equal number of votes, the right to the office shall be determined by lot.

Second. If the candidate receiving the highest number of votes be *ineligible*, then a new election shall be ordered.

Third. If the contest is between candidates eligible to the office, then the one who has received the highest number of *legal* votes shall be entitled to the office.

If the Legislature had intended, that in case where there was a contest between candidates, and it should appear that one of them was ineligible, that the other, although receiving a less number of votes, should be entitled to the office, it was easy to have said so. Such is not, however, the language of the section, nor can any such conclusion be drawn from it; on the contrary, it appears, that in just such a case as the one now under consideration, it is expressly declared that a new election shall be ordered: *Simmons* v. *Hinton*, 1 Duv. 40.

We are clearly of the opinion that the contestant is not entitled to the office.

It is therefore considered by this Board that Thomas C. Jones is ineligible to hold and exercise the office of Clerk of the Court of Appeals, and that the contestant, J. B. Cochran, is not entitled to said office; and it is further considered and adjudged that the said office is vacant, and a new election is hereby ordered.

The minority of the Board filed an opinion dissenting from the foregoing conclusions, on the grounds:

First, that the verbal reply by the respondent to Woodford having been objected to by the latter was withdrawn and was not under the circumstances an acceptance of the challenge, and the testimony showed that Pointer's instructions from the respondent were not to commit him to a duel. The offence therefore was not made out.

Secondly, that even if the evidence were clear on the first point, the Constitution makes duelling a crime and prescribes deprivation of the right to hold office as a punishment; and under the Constitution of Kentucky punishment for crime can only be inflicted after indictment and conviction by a jury in a court of competent jurisdiction.

The question of jurisdiction here decided is, we believe, entirely novel and not devoid of difficulty. Without wishing to question the correctness of its

conclusions we must observe that the majority of the Board hardly answer the objection that the disqualification of duellists under the Constitution of Kentucky is a punishment. If the object of those who made the Constitution was to discourage duelling, if the disability was created, as is said in the opinion of the Board, to supplement the penal laws which were found ineffectual, then it does seem that it is of the nature of a punishment; and the disability of clergymen and of federal officers obviously not created with this view is not parallel. But it is going too far to say that this was the object of the provision, or at least the sole object. In South Carolina an Act of 1812 attached the same disability to those convicted of duelling or challenges to fight. In *The State* v. *Dupont*, 2 McCord 334, it was urged that the law was unconstitutional, on what ground does not appear in the report, but probably because the punishment was cruel or unusual. HUGER, J., decided, however, that the disqualification for office was no part of the penalty, but a result flowing from conviction. The better position for the Kentucky Board to have taken would seem to be that the disqualification of duellists in their state was imposed for political reasons rather than created *in terrorem*.

By the common law killing in a duel is murder, in principal and seconds, whether challenging or challenged: 1 Hale P. C. 452, where the decision of Sir EDWARD COKE in *Taverner's Case*, 3 Bulstrode 171, is cited. The giving or receiving a challenge to fight is indictable at common law as tending to make others break the peace: 4 Black. Com. 144; *Rex* v. *Rice*, 3 East 581. In none of the American states, so far as we know, is the common law altered, except in California, where homicide in a duel is not murder, but a statutory offence: *Terry* v. *Bartlett*, 14 Cal. 657; but in nearly all of them there are strict legislative enactments declaring and enforcing the common law, and often constitutional provisions similar to that of Kentucky.

The severe penalties denounced against all concerned in challenges to fight; those who give, those who accept, and those who carry them or perform any of the usual duties of seconds; make it an important question what constitutes the offence under the statutes.

Challenges to fight with weapons not deadly, as with fists, are obviously not within the spirit of the statutes, if even within their letter, and the indictments always allege that the weapons were to be deadly.

It has repeatedly been held that no particular form of words is necessary to constitute a challenge, and it is generally immaterial whether the offer be written or oral. It is necessary, however, that the proposition should be a serious one, and not by way of banter or braggadocio; and the question of intent is for the jury. Thus in *The State* v. *Strickland*, 2 Nott & McCord 181, the defendant, as the prosecutor expressed it, "bantered him to go out into the old field to fight a duel," to which he replied he did not fight in that way, and that he had no gun. Defendant told him to go and get a gun, and offered to lend him ammunition. Other witnesses denied that the defendant used the word *duel*. It appeared that he said he would defeat the prosecution as the law required a written challenge. The question was submitted to the jury whether there was sufficient proof of a challenge to fight with deadly weapons, or whether it was a mere effusion of passion and expression of empty threats without any serious intention or expectation of a duel. Upon a verdict of *guilty*, the court in bane refused a new trial. In *Ivey* v. *The State*, 12 Ala. 277, the same principle was decided. The defendant came to the prosecutor and told him he had come to have a difficulty with him, and

would fight him in any way and in any place, and a few minutes afterwards laying his hand on a pistol told the prosecutor to prepare himself. The jury having been directed by the judge to determine whether a fight with deadly weapons was intended, the charge was sustained on error by the Supreme Court. To the same effect is *State* v. *Perkins*, 6 Black. 20. *Commonwealth* v. *Hart*, 6 J. J. Marshall 119, was a case where a letter of the defendant alleged to be a challenge was excluded from evidence on the ground that its contents did not amount to a challenge within the meaning of the statute, and consequently did not conduce to support the charge contained in the indictment. The Court of Appeals reversed the court below on the ground that the letter should have been submitted to the jury. UNDERWOOD, J., saying, however, in delivering the opinion: "The letter of Hart contains upon its face enough to show that if it really was his intention to challenge Twiman to a combat with rifles, it was a procedure very different from the ordinary course taken by duellists. There were no seconds provided, and it is singular that one man should challenge another to meet him alone, and that they should by themselves end a dispute with rifles and without any friends to prescribe rules or to see that they were fairly executed. Still, anger and desperation might drive a man to such a fight. It is moreover strange that Hart should consent to fight, upon such terms, a man to whom in his letters he applies the epithets of a puppy, blackguard and companion for negroes. Under this view of the letter the idea suggests itself that the whole affair was no more than a bullying farce. * * * Whether this was the design of Hart, or whether in good earnest he intended and desired to fight with rifles and challenged accordingly, belonged to the jury to determine."

But alleged challenges must have the general character of a *requisition*, *demand* or *request*, to fight with deadly weapons. The expression of a readiness to accept a challenge does not amount to a challenge, though it may to a misdemeanor at common law: *Commonwealth* v. *Tibbs*, 1 Dana 524. In this case the defendant had said to another, "I will fight you with a pistol or a rifle from one step to a hundred yards," and it was held that the jury were entitled to acquit. This principle is recognised in *Aulger* v. *The State*, 34 Ill. 486, one of the latest American cases on the subject.

The place where the duel was to be fought need not be averred or proved; the offence against the public peace is complete when the challenge is given. In *Ivey* v. *The State*, the offer was to fight in any place; in *The State* v. *Taylor*, 3 Brevard 243, the challenge was given in South Carolina to fight in Georgia; in *The State* v. *Farrier*, 1 Hawk. 481, the challenge was in North Carolina to fight in South Carolina. In all these cases the jurisdiction of the locality of the challenge was upheld.

In *Commonwealth* v. *Bort*, Thacher's Criminal Cases 390, there was a challenge in Massachusetts and a duel in Rhode Island. It was held by THACHER, J., that whatever might be the law of Rhode Island, the challenge was an offence cognisable in Massachusetts, and he cited *Rex* v. *Burdett*, 4 B. & Ald. 95, where it is held that where a misdemeanor is committed partly in one county and partly in another it may be tried in either.

In an indictment for a challenge it is not necessary to set forth a copy of the challenge, and if it varies slightly from the original, preserving the sense, it seems that such variance is not fatal: *State* v. *Farrier*, supra. Probably the law laid down by THACHER, J., in the Boston municipal court is universal; that upon the trial of an indictment for sending a challenge it is sufficient to

show that a challenge was sent either by letter or by word of mouth, without producing the letter, though if it be averred that a letter was sent that fact must be proved: *Commonwealth* v. *Hooper*, Thacher's Criminal Cases 400. See also *Brown* v. *Commonwealth*, 2 Virginia Cases 576. In *Commonwealth* v. *Rowan*, 3 Dana 397, the indictment charged that the defendant accepted a written challenge to fight with deadly weapons, viz.: with pistols, "which writing," it says, "is as follows," reciting a letter which without being more explicit in its object requires "that ultimate arrangement customary under such circumstances," and avers acceptance of such challenge by a letter also recited in full. A demurrer to the indictment having been upheld below the Court of Appeals affirmed this judgment, holding that without this correspondence the charge would have been sufficient, or with it had there been an averment that the parties intended and understood the letter as a challenge. Then the correspondence would have been evidence, and other proof would have been admissible to show the intention. *Com* v. *Pope*, 3 Dana 418, was a decision of the same court in the same term, in which the judgment of the court below sustaining a demurrer to an indictment for challenging was reversed. The indictment contained a copy of the alleged challenge, apparently merely a demand for satisfaction, but there were allegations that the letter was intended and understood as a challenge to fight with deadly weapons, and, further, that the intent was to fight it, to wit: with pistols. *Held*, that the indictment was good on its face, for the true intent and meaning of the supposed challenge might be shown upon the trial by proof oral or written. These last two decisions are affirmed in two late Kentucky cases: *Moody* v. *Commonwealth*, 4 Metcalfe 1, and *Heffren* v. *Commonwealth*, Id. 5.

It seems from *Commonwealth* v. *Boot*, supra, and *Moody* v. *Commonwealth*, that evidence as to the *code duello* is not admissible, at least, as was said in the last case, without producing the code; and this might be a difficult matter.

G. H. F.

United States Circuit Court—Eastern District of Virginia.

UNITED STATES *v.* PETERSBURG JUDGES OF ELECTION.
UNITED STATES *v.* PETERSBURG REGISTRARS OF ELECTION.

The Fourteenth Amendment declares what shall constitute citizenship of the United States as well as of the several states, and gives Congress the power to protect the citizen in all the franchises, rights and privileges which belong to him either as a citizen of the United States or of a state.

The rights which are given to a citizen by a state, such as the right to vote when possessing certain qualifications, may be modified or taken away by the state, and the United States cannot interfere, but so long as the right remains, the United States has the power to protect him in its enjoyment and exercise.

Rights which do not arise from citizenship but accrue to men as men, such as the security of life and property, remain under the exclusive protection of the states.

The Enforcement Act of May 31st 1870, providing for the punishment of obstructing voters, is appropriate legislation to enforce the Fourteenth Amendment,